Supreme Court, U.S.
FILED
FEB 12 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1091

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

ANDREW LEONI AND HOUSTON SLATE,
Appellants,

v.

THE STATE BAR OF CALIFORNIA,
Appellee.

On Appeal from the Supreme Court of the State of California

REPLY BRIEF FOR APPELLANTS

JOSEPH N. ONEK *
PAUL M. SMITH
ONEK, KLEIN & FARR
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184
Counsel for Appellants
* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF AUTHORITIES

CASES Page

Bates v. State Bar of Arizona, 433 U.S. 350 (1977) .. 4, 5, 6
Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) 4
Zauderer v. Office of Disciplinary Counsel, 105 S. Ct. 2265 (1985) 4, 5, 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1091

ANDREW LEONI AND HOUSTON SLATE,
Appellants,

v.

THE STATE BAR OF CALIFORNIA,
Appellee.

On Appeal from the Supreme Court of the State of California

REPLY BRIEF FOR APPELLANTS

Appellee's motion to dismiss or affirm is primarily taken up with an effort to recast the facts of this case so as to avoid the substantial constitutional problems raised by appellants. The State Bar seeks to portray this as a run-of-the-mill case involving advertisements that were deceptively phrased. In fact, however, this portrayal is neither accurate in itself nor a fair description of what the California Supreme Court concluded about appellants' letters. That court ruled against appellants because it believed that it is constitutional to hold an author of a "personalized" commercial solicitation responsible whenever even a single consumer is confused by his letter—regardless of the level of the harm or the justifiability of the confusion—at least where the court can, after the fact, think of some phrasing that might have alleviated the problem. This constitutional analysis is fundamentally flawed.

1. The State Bar asserts repeatedly that this case involves written solicitations that contained false advice, or contained an implicit message that was inaccurate with respect to particular readers. The reality, however, is quite different. While there is no doubt that a few consumers were confused and/or unduly concerned after reading the letters, it simply is not true that these reactions can be tied to deceptive phrasing in the letters.

What appellants set out to do in these letters was to provide accurate information about how the legal system works in cases involving small debts. They described some of the outcomes that can result from neglecting a lawsuit and outlined some of the possible options, including Chapter 13 of the Bankruptcy Code. Appellants noted that, far from researching the reader's particular case, they had simply drawn the name from a court list. They then urged persons who had retained counsel to consult with their attorneys, and offered to provide free advice to persons who lacked representation.

It is clear, therefore, that the minor harms experienced by the seven complainants in this case occurred not because of, but *despite* the actual phrasing of the letters. Several persons, for example, simply were concerned that their lawyers had not taken appropriate steps to prevent a judgment or execution, even though the letters in no way implied that this was true.[1] In another case, a corporation decided to ignore the advice of its lawyer and pay a judgment entered against a judgment-proof subsidiary. Yet the letters said nothing at all about a corporation's liability for subsidiaries.[2] In one case, the harm apparently resulted, not from any statement in the letter, but from the fact that persons other than the addressee read the letter and learned about the pendency of a lawsuit.[3] In still another, the letter accurately

---

[1] App. 9a-10a.

[2] App. 8a-9a.

[3] App. 11a.

reported that a recipient's opponent had obtained a writ of execution—a fact theretofore unknown to the recipient—and the only criticism was based on the fact that the plaintiff had decided to defer the use of that writ.[4]

2. In sum, the court below had good reason for deemphasizing any focus on what appellants actually said,[5] and looking only at effects. It relied mainly on the theory we described in the jurisdictional statement—that a letter may become "misleading" and thus subject to suppression if one or a few readers are *in fact* confused. In the court's view, such occasional confusion, when it occurs, is by itself a sufficient basis for punishing those who distribute personalized solicitations, at least where, after the fact, the court can think of a further disclosure or disclaimer that would have been better. This approach would mean the effective elimination in California of any efforts to reach potential clients through personal letters.

When appellee finally faces up to the issue decided below, it wholeheartedly endorses the approach just described. The Bar states flatly that any lawyer who advertises by mail to particular individuals has the responsibility to ensure total accuracy and to ensure the inclusion of every fact needed to prevent the confusion of even one reader. Br. at 35-36.[6] It would not require

---

[4] App. 10a-11a.

[5] The court rejected any reliance on the theory that the letters were *false*. App. 21a-22a. It did find that two particular passages in some of the letters contained misleading omissions. But the main holding below was based entirely on the general nature of the letters as personalized solicitations aimed at persons who had been sued. Moreover we have already discussed in the jurisdictional statement, at 23-25, the reasons why the two specific findings of omissions cannot support the court's judgment.

[6] The Bar would apparently limit this requirement to letters "purporting to advise [readers] about their specific legal problems." Br. at 35. But in view of the Bar's willingness to find such particularized advice in appellants' letters—letters which simply laid

any showing that a substantial *number* of persons were confused, or that the confusion resulted from a deceptive *phrase* in the letter.

As we have pointed out, this Court has flatly rejected such an approach in two cases involving other kinds of lawyer advertising. *Bates v. State Bar of Arizona*, 433 U.S. 350, 373 n.28 (1977); *Zauderer v. Office of Disciplinary Counsel*, 105 S. Ct. 2265, 2276 n. 9 (1985). These cases each involved types of advertising that would predictably cause some confusion to some persons, but the Court held that this fact provided an insufficient basis for suppression of a whole category of commercial speech. It held that these kinds of problems should instead be minimized through mandated disclosures or disclaimers.

The State Bar does not dispute our analysis of *Bates* and *Zauderer*. Instead, it seems to argue that a different rule should apply here merely because the letters at issue were "solicitations" in the sense that they were personalized and made reference to the fact that the recipient was a defendant in an ongoing lawsuit. Br. at 35-36. There is no basis for such a distinction.

First of all, written solicitation letters do not, merely by virtue of the fact that they are addressed to particular people, raise all of the concerns associated with in-person solicitation of clients. *Cf. Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978). In fact, written solicitations are much more comparable to general advertisements. Here, for example, appellants' decision to use letters—rather than general advertisements discussing the same legal issues—probably made no difference at all in the effects caused to most of the complainants. If appellants had sent the same message to the same people in the form of a generalized advertisement, there could

---

out various possible options and urged readers to see a lawyer if they had not already done so—this qualification provides little or no reassurance.

have been the same number of readers who misread the ad and reacted with confusion or fear about the status of their own particular case.[7] *Bates* and *Zauderer* make clear that this kind of occasional confusion provides no basis for suppression of advertisements, particularly since the problem generally will be cleared up as soon as the consumer speaks to an attorney. Since the potential for confusion is fundamentally no different in a case involving personalized letters, and that confusion can be cleared up in precisely the same fashion, we see no basis for applying a different rule in that context.[8]

More importantly, any perceived differences between general advertisements and written solicitations can be eliminated through the very regulatory approach suggested in *Bates*—mandated disclaimers or disclosures. While the inclusion of mandatory language in a solicitation letter may not be enough to ensure the total prevention of all consumer confusion, it can effectively eliminate any reason for concern that the letter *format* will cause undue reliance by readers. If a state were to require an "advertisement" label on every such letter, and/or a statement disclaiming any knowledge of the reader's individual case, it could effectively cause every

---

[7] To be sure, with personalized solicitations, there is some additional danger that a letter will cause readers to believe that the lawyer has analyzed their case and is giving them his advice. But at least where the letter does not make any claim to be based on knowledge of an individual case, this confusion is no different in principle from the kinds of consumer confusion discussed in *Bates* and *Zauderer*.

[8] We note, in this regard, that all seven of the complainants were among those recipients who were already represented by counsel. In only one case did a complainant actually do anything in reliance on his understanding of the letters—*i.e.*, in the Sitelines matter, where a company somehow drew the conclusion that it should pay a judgment for a judgment-proof subsidiary. In every other case, where letters led readers to have concerns about the handling of their cases, it appears that they simply expressed their concerns to their own counsel and were reassured.

consumer to view the letter as comparable to a generalized advertisement of legal services.

The approach adopted below, by contrast, requires the letter writer to (1) avoid even one instance of consumer confusion, or (2) anticipate every possible disclaimer or disclosure that a court might conjure up after the fact. Such a regulatory approach, while formally less restrictive than an outright ban on written solicitations, is actually no different. Even now, lawyers in California do not know what they have to say in order to undertake a letter campaign similar to appellants'. Certainly the State Bar has not included any specific suggestions in its brief. The resulting chill on free speech will lead to precisely the outcome foreclosed by *Bates* and *Zauderer* —an effective prohibition of a category of truthful commercial discourse based on a concern about minor harms caused to a few consumers who will misread what is written to them.

CONCLUSION

For these reasons, the Court should note probable jurisdiction and reverse the judgment below.

Respectfully submitted,

JOSEPH N. ONEK *
PAUL M. SMITH
ONEK, KLEIN & FARR
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184
Counsel for Appellants

* Counsel of Record